TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~707~~ 69

SAFEWAY STORES, INCORPORATED, PETITIONER,

vs.

HARRY V. VANCE, TRUSTEE IN BANKRUPTCY FOR FRANK MELVIN THOMPSON, BANKRUPT

ON WRIT OF CERTIORARI TO THE UNITED STATES [redacted] COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 22, 1957

CERTIORARI GRANTED MARCH 4, 1957

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 707

SAFEWAY STORES, INCORPORATED, PETITIONER,

vs.

HARRY V. VANCE, TRUSTEE IN BANKRUPTCY FOR FRANK MELVIN THOMPSON, BANKRUPT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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[fol 1]

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 5566

HARRY V. VANCE, Trustee in Bankruptcy for Frank Melvin Thompson, a Bankrupt, Appellant,

vs.

SAFEWAY STORES, INCORPORATED, a Corporation, Appellee

STATEMENT OF POINTS—Filed April 9, 1956

The points upon which Appellant intends to rely on this appeal are as follows:

1. The Court erred in dismissing Plaintiff's First Amended Complaint for failure to state a claim.

2. The Court erred as a matter of law in holding that Section III of the Robinson-Patman Act, (Title 15 U.S.C. Section 13a) does not afford a civil remedy for treble damages.

Nordhaus & Moses, by Robert Nordhaus, Attorneys for Appellant.

[fol. 2] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

Pleas and Proceedings Before the Honorable Waldo H. Rogers, United States District Judge for the District of New Mexico, Presiding in the Following Entitled Cause:

HARRY V. VANCE, Trustee in Bankruptcy for Frank Melvin Thompson, Bankrupt, Plaintiff,

vs.

SAFEWAY STORES, INCORPORATED, a Corporation, Defendant

No. 2930, Civil

FIRST AMENDED COMPLAINT—Filed November 15, 1955

Plaintiff states for his first amended complaint:

I. That plaintiff is a citizen of Albuquerque, New Mexico, and is the Trustee in Bankruptcy of Frank Melvin Thompson, who was adjudicated a bankrupt in this court on May

28th, 1955, in cause numbered 2235 in Bankruptcy; that Frank Melvin Thompson is a citizen of New Mexico.

II. That defendant at all times material hereto was and now is a corporation organized and existing under the laws of the State — Maryland and qualified as a foreign corporation in New Mexico.

III. That from about the year 1948 until May, 1955 the said Frank Melvin Thompson owned and operated a retail grocery store and market in said City of Albuquerque under the trade name and style of New York Food Market.

IV. That as of December 31st 1954 defendant was the second largest food chain in the United States, operating more than 2,000 supermarkets in 24 states of the United States and in five provinces of Canada, with sales in the [fol. 3] United States in the year 1954 of over $1,600,000,000; that defendant employed over 49,000 persons in that year, and its facilities included the following: 33 grocery warehouses, 24 produce warehouses, 11 meat warehouses, 24 bakeries, 2 jam and jelly plants, a candy plant, 11 fluid milk plants, 9 ice cream plants, 7 coffee roasting plants, a fruit cannery and a vegetable cannery; that food products manufactured, processed and stored in the various installations mentioned in this paragraph were at all times material hereto shipped from these installations in interstate commerce directly to defendant's supermarkets in the City of Albuquerque, New Mexico, where they are sold at wholesale and retail to consumers and others.

V. That at all times material hereto, defendant's operations in the District of New Mexico, and the economic consequences of such operations, were as follows:

a) Defendant's store operations in the United States are divided into 15 Distribution Divisions, one of which is the El Paso Division which serves West Texas and New Mexico including the City of Albuquerque and vicinity; defendant operates approximately 41 stores in 26 cities within the El Paso division, 15 of which are in Texas and 26 in New Mexico. Total sales by all of defendant's stores in 1954 in the El Paso Division were over $37,000,000.

b) Defendant was and is the dominant distributor and retailer of food products in West Texas and New Mexico,

selling substantially more food and food products in its stores than any of its competitors.

c) Defendant supplied and now supplies all of its retail stores in New Mexico from warehouse facilities it operates in El Paso, Texas, transporting the greater portion of the food products sold in its stores in its own trucks from outside New Mexico directly to its stores in Albuquerque and elsewhere in New Mexico.

d) Defendant's sales in its stores in Albuquerque were and are made both at wholesale and retail.

e) By reason of defendant's relatively unlimited financial resources, as heretofore mentioned, its extensive processing and storage facilities located throughout the United States, its centralized management, and its domi- [fol. 4] nant position as a food distributor and retailer in West Texas and New Mexico, defendant was and is able to destroy competition in the City of Albuquerque at the will of its management.

VI. That at various times material hereto and particularly during the period September 1, 1954 to the date of filing this complaint, defendant, at the direction of its management located in El Paso, Texas, and Oakland, California, sold goods in the course of interstate commerce in its stores in the said City of Albuquerque at prices substantially lower than prices exacted by defendant for the same goods in other cities and towns in New Mexico and elsewhere in the United States, for the purpose of destroying competition in the grocery business in the said City of Albuquerque, in violation of Section 3 of the Act of Congress of June 19, 1936, commonly known as the Robinson-Patman Act (49 Stat. 1528, 15 U.S.C. 13a) and Section 4 of the Clayton Act as amended (38 Stat. 731, 15 U.S.C. 15); that substantially all of the said prices were established from time to time by defendant's management located outside of New Mexico, without any substantial intervening discretion being exercised by defendant's employees in New Mexico. That practically all of defendant's advertising and merchandising policies, including the price wars herein complained of, were directed to the last detail by defendant's management from outside of New Mexico.

VII. That at various times material hereto, and particularly during the period September 1, 1954 to the date of filing this complaint, defendant sold goods in the course of interstate commerce in the said city of Albuquerque at unreasonably low prices for the purpose of destroying competition in the grocery business in the said City of Albuquerque, in violation of Section 3 of the Robinson-Patman Act, and Section 4 of the Clayton Act, as amended, hereinabove cited; that substantially all of such prices were established from time to time by defendant's management located outside of New Mexico, without any substantial intervening discretion being exercised by defendant's employees in New Mexico; that defendant's advertising and merchandising policies with respect to such sales were directed in detail by its management from outside New Mexico.

[fol. 5] VIII. That the goods sold in violation of the Robinson-Patman Act as alleged hereinabove in paragraphs VI and VII included the following:

Soft drinks, especially Coca Cola
Coffee, regular grind, drip and instant
Family flour
Butter
Magarine
Milk, fresh and canned
Fresh bread
Shortening
Sugar, beef, cane and brown
Soaps and detergent
Salad Dressing

and many other articles of food; that the articles specifically mentioned herein are staple items of food, important in the budget of every housewife, and best calculated when advertised at unreasonably low prices to attract large numbers of customers from competitors and to destroy competition; that the grocery items hereinabove mentioned constitute a substantial portion of total volume of sales in the grocery industry, and competitors of defendant, not as strong financially as defendant, could not afford to sell such items at unreasonably low prices over a period of

time and remain in business; that defendant engaged in a policy, directed by its management located outside of New Mexico, to sell the above mentioned articles in its stores in Albuquerque (the greater portion of said articles being delivered by defendant's trucks from outside New Mexico, directly to its retail stores in Albuquerque) at unreasonably low prices over a period of more than six months, with the knowledge and intent that such action would destroy a number of its smaller competitors in Albuquerque; that in truth and fact, the result intended by defendant was accomplished, and a number of its competitors, including plaintiffs, were destroyed as the proximate result of the illegal actions of defendant described in this complaint.

IX. That as a proximate result of each and every one of the defendant's unlawful actions described in this complaint, the said Frank Melvin Thompson suffered loss of business and profits in the years 1954 and 1955 to his damage in the sum of $20,000.00.

[fol. 6] X. That said loss of business and loss of profits proximately resulting from defendant's illegal actions hereinabove described caused the said Frank Melvin Thompson to become insolvent and to lose his grocery and market business in the month of May, 1955, together with all other non-exempt personal and real property owned by him, to his damage in the sum of $25,000.00.

Wherefore, plaintiff prays judgment against the defendant in the sum of $45,000.00, and that said judgment so recovered be trebled, in accordance with the terms of the statute; for reasonable attorney's fees; for costs of suit and for such other relief as to the Court may seem just.

Nordhaus & Moses, by Robert Nordhaus, Attorneys for Plaintiff.

In United States District Court for the District of New Mexico

Motion to Dismiss Plaintiff's First Amended Complaint —Filed November 30, 1955

Comes now the defendant, Safeway Stores, Incorporated, and moves the Court for an order dismissing the first amended complaint in the above entitled cause for the following reasons and upon the following grounds:

I. The first amended complaint fails to state a claim or claims upon which relief can be granted, in that it does not contain a short and plain statement of the claim or claims showing that the pleader is entitled to relief as required by Rule 8 (a) of the Federal Rules of Civil Procedure.

II. The first amended complaint fails to state a claim or claims upon which relief can be granted in that it does not allege sufficient facts with particularity to state a violation or violations of Section 3 of the Robinson-Patman Act (15 U.S.C.A. 13a) as is required of complaints purporting to allege violations of said Act.

III. The first amended complaint fails to state a claim or claims upon which relief can be granted and fails to es- [fol. 7] tablish the jurisdiction of this Court over the subject matter of this action for the reason that said complaint does not concern transactions, occurrences or activities taking place in the course of interstate commerce and within the scope of Section 3 of the Robinson-Patman Act (15 U.S.C.A. 13a).

IV. The first amended complaint fails to state a claim or claims upon which relief can be granted under Section 3 of the Robinson-Patman Act (15 U.S.C.A. 13a) for the reason that said section is unconstitutional, being so vague and indefinite that it violates the Fifth and Sixth Amendments to the Constitution of the United States, having no reasonable relation to the anticipated evil and constituting an unreasonable interference with freedom of contract as guaranteed by the Fifth Amendment to the Constitution of the United States.

V. The first amended complaint fails to state a claim or claims upon which relief can be granted under Section 3 of

the Robinson-Patman Act (15 U.S.C.A. 13a) for the reason that said Section is not one of the "antitrust laws" within the purview of Section 4 of the Clayton Act (15 U.S.C.A. 15), and no private right of action for violation of said Section exists under any laws of the United States.

VI. The first amended complaint fails to state a claim or claims upon which relief can be granted under Section 3 of the Robinson-Patman Act (15 U.S.C.A. 13a), for the reason that said complaint fails to allege facts establishing a violation of Section 3 of the Robinson-Patman Act or facts demonstrating injury to plaintiff's business or property on account of an alleged violation of said section.

Wherefore, upon the grounds stated defendant respectfully prays that the first amended complaint be dismissed.

W. A. Keleher and John B. Tittmann, By John B. Tittmann, Attorneys for Defendant.

[fol. 8] In United States District Court for the District of New Mexico

Order Dismissing Complaint—Filed January 18, 1956

The above styled and numbered cause coming on for hearing before the court upon the defendant's motions to dismiss, to strike and for a more definite statement, and the parties appearing by their respective counsel, the court having considered the briefs submitted by respective counsel, having heard argument of counsel, and being fully advised and informed, finds and concludes that defendant's motion to dismiss the complaint herein should be granted on the ground that Section 3 of the Robinson-Patman Act (Title 15 USC Section 13a) does not afford to a private litigant a civil remedy for treble damages within the purview of Sections 1 and 4 of the Clayton Act (Title 15 USC Sections 12 and 15), and that no decision is necessary upon the other grounds of said motion to dismiss or upon the remaining motions.

Wherefore, it is ordered, adjudged, and decreed: That plaintiff's complaint herein be and the same hereby is dismissed upon the ground above stated.

It is further ordered that plaintiff be and he hereby is granted 30 days from the entry hereof to amend his complaint.

Waldo H. Rogers, District Judge.

O. K. as to Form Nordhaus & Moore Attys for Plaintiff.

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

OPINION OF THE COURT—January 19, 1956

This cause comes before the Court upon the first Amended Complaint filed by Harry V. Vance, Trustee in Bankruptcy for Frank Melvin Thompson, a Bankrupt, against Safeway Stores, Incorporated, a corporation, and a Motion to Dismiss said First Amended Complaint, a Motion of the Defendant for a More Definite Statement of Plaintiff's First Amended Complaint, and a Motion to Strike from said First Amended Complaint certain allegations contained in the last-mentioned pleading. Plaintiff seeks [fol. 9] Judgment against the Defendant in the sum of Forty-Five Thousand Dollars ($45,000.00) and that the Judgment so recovered be trebled, for reasonable attorneys fees, costs of suit, and for other equitable relief under an alleged violation of Section 3 of the Act of Congress of June 19, 1936, commonly known as the Robinson-Patman Act (49 Stat. 1528, 15 U.S.C.A. 13a) and Section 4 of the Clayton Act, as amended (38 Stat. 731, 15 U.S.C.A., Section 15).

A short summary of the allegations contained in the Amended Complaint, are deemed necessary for a proper presentation of the questions of law arising by the attack levied against the Amended Complaint by the above-mentioned Motions.

The Complaint alleges that Vance is the Trustee in Bankruptcy of Thompson, who was adjudicated a bankrupt may 28, 1955, Thompson being a citizen of New Mexico; that the defendant is a Maryland corporation, qualified as a foreign corporation in New Mexico; that from 1948 until May, 1955, Thompson operated a retail grocery store

May 28, 1936, and it and the Robinson-Patman Bill went to conference. The Conference Committee reported a revised draft on June 8, 1936, incorporating the Borah-Van Nuys amendment as Section 3.

The following excerpts from the Congressional Record show that Section 3 is a separate criminal statute, not to be construed in connection with other Sections of the Robinson-Patman Act, and not a part of the Anti-trust Laws: Rep. Patman, co-author of the Robinson-Patman Act, in his testimony before a sub-committee of the House Judiciary Committee on May 10, 1950, stated that Section 3 was definitely not a part of the Clayton Act or of the Anti-trust Laws:

"* * * section 3 of the Robinson-Patman Act has never been added to the list of laws designated as 'antitrust laws' in section 1 of the Clayton Act.

"* * * the House did not put section 3 in that act, it was put in in the Senate, Senator Borah and Senator Van Nuys were the authors, it was put in and in conferences, to get a bill, we agreed for it to stay in. Since that time section 3 has not been carried as part of the antitrust laws. It should be. I hope that you will consider making it clear in this bill."

(Hearing on House H. R. 7905, Serial No. 14, Part 5, p. 48, 81st Cong., 2d sess.).

Rep. Miller, one of the conferees of the measure, stated as follows, (80 Cong. Rec. 9421):

"Section 3, which the gentleman from New York talks about, is the Borah-Van Nuys amendment and that is the criminal section of this bill. * * * Section 3 in the bill is placed in an effort to make the criminal offense apply only to that particular section, and believe that is a reasonable construction, if you will look at the bill."

Rep. Miller further stated:

[fol. 25] "Section 3 is the Borah-Van Nuys amendment. We accepted that amendment for this reason and this reason only. The first section of the bill as reported back here amends section 2 of the Clayton Act." (Italics supplied).

in Albuquerque, New Mexico. There then followed a statement descriptive, according to the plaintiff, of the defendant corporation. In effect, it alleges that the defendant is the second largest food chain in the United States, operating more than two thousand supermarkets in twenty-four states, having a very large sales in the United States, employing over forty-nine thousand persons, and owning and operating various warehouses, bakeries, candy plants, milk plants and similar food processing establishments. It is thereafter alleged that defendant's operations in the United States are divided into fifteen distribution divisions, one of which is the El Paso Division serving West Texas and New Mexico, including Albuquerque. Defendant is alleged to be the dominant distributor and retailer of food products in West Texas and New Mexico, and that it supplies its retail stores in New Mexico from warehouse facilities operated in El Paso, Texas, transporting the greater portion of the food products sold in its stores in its own trucks from outside New Mexico, directly to its stores in Albuquerque, and elsewhere in New Mexico. An allegation appears that defendant's sales in its stores in Albuquerque are both at retail and wholesale. There then appears an omnibus allegation that by reason of defendant's unlimited financial resources, and its processing and storage facilities, its centralized management and its [fol. 10] dominant position as a food distributor in this region, defendant was and is able to destroy competition in the City of Albuquerque, at the will of its management. It is then alleged that between September 1, 1954, to the date of the filing of the Complaint, defendant, at the direction of its management located in El Paso, Texas, and Oakland, California, sold goods in the course of interstate commerce in its Albuquerque stores, at prices substantially lower than prices exacted by defendant for the same goods in other cities and towns in New Mexico, and elsewhere in the United States, for the purpose of destroying competition in the grocery business in the City of Albuquerque, in violation of those sections of the Federal Statutes first above cited. It is specifically alleged that substantially all the prices were established by defendant's management located outside of New Mexico. Certain goods are attempted to be specified as having been sold in viola-

Rep. Miller, when asked whether Section 3 was "a part of the same act" as the part of the bill amending the Clayton Act, replied, (80 Cong. Rec. 9421):

"Of course it is; but it is not a part of the Clayton Act as amended by section 2 (Section 1 of the Robinson-Patman Bill)."

The Conference Committee report, House Report No. 2951, 74th Congress, 2d sess., p. 8 (80 Cong. Rec. pp. 9414-9415) states:

"* * * Section 3 of the bill * * * contains the operative and penal provisions of what was originally the Borah-Van Nuys bill (S. 4171). While they overlap in some respects, they are in no way inconsistent with the provisions of the Clayton Act amendment provided for in section 1." (Italics supplied)

Rep. Utterback, Chairman of the House Managers, stated as to Section 3, as follows, (80 Cong. Rec. 9419):

"Section 3. Penal provisions. Section 3 of the bill sets aside certain practices therein described and attaches to their commission the criminal penalties of fine and imprisonment therein provided. It does not affect the scope or operation of the prohibitions or limitations laid down by the Clayton Act amendment provided for in section 1." (Italics supplied).

The distinction between Section 3 and Section 1 of the Act is further manifest by the conference committee report, which stated:

"Section 3 authorizes nothing which that amendment (Section 1 of the Robinson-Patman bill) prohibits and takes nothing from it. On the contrary, where only civil remedies and liabilities attach to violations of the amendment provided in section 1, section 3 sets up special prohibitions [fol. 26] as to the particular offenses therein described and attaches to them also the criminal penalties therein provided." (Italics supplied.)

See H. Rep. No. 2951, 74th Cong. 2d sess. p. 8 (80 Cong. Rec. pp. 9414-9415).

tion of the Robinson-Patman Act. These include soft drinks, coffee, flour, butter and other household staples. It is then alleged that when these items are advertised at unreasonably low prices, to attract large numbers of customers, this has a tendency to destroy competition, and it is alleged that defendant's competitors could not afford to sell such items at unreasonably low prices over a period of time, and remain in business. It is stated that said unreasonably low prices extended over a period of more than six months, with the knowledge and intent on the part of the defendant that such action would destroy a number of its smaller competitors in Albuquerque, and that as a proximate result of the alleged illegal action of the defendant, a number of defendant's competitors, including the plaintiff, were destroyed. They specifically allege that the bankrupt Thompson suffered a loss of business and profits in the years 1954 and 1955 to his damage in the sum of Twenty Thousand Dollars ($20,000.00), and further, as a proximate result of defendant's alleged illegal actions, Thompson became insolvent, became bankrupt, and lost his grocery business to his damage in the amount of Twenty-five Thousand Dollars ($25,000.00).

The defendant's Motion to Dismiss plaintiff's First Amended Complaint is based on the following grounds, first, that the First Amended Complaint fails to state a claim upon which relief can be granted, in that it does not contain a short and plain statement of the claimants, showing [fol. 11] plaintiff entitled to relief as required by Rule 8 (a) of the Federal Rules of Civil Procedure; second, that the Amended Complaint fails to state a claim on which relief can be granted, in that it did not allege sufficient facts with particularity to state a violation of Section 3 of the Robinson-Patman Act (15 U. S. C. A. 13a); third, that the Amended Complaint fails to state a claim upon which relief can be granted, and fails to establish the jurisdiction of this Court over the subject matter of this action, for the reason that the Complaint does not concern transactions, occurrences or activities taking place in the course of interstate commerce and within the scope of Section 3 of the Robinson-Patman Act, supra; fourth, the Amended Complaint fails to state a claim on which relief can be granted under Section 3 of the Robinson-Patman Act, supra, for

the reason that Title 15, U.S.C.A., Section 13 a, is unconstitutional, being so vague and indefinite, that it violates the Fifth and Sixth Amendments to the Constitution of the United States, having no reasonable relation to the anticipated evil, and constituting an unreasonable interference with freedom of contract, as guaranteed by the Fifth Amendment to the Constitution of the United States; fifth, that the Amended Complaint fails to state a claim upon which relief can be granted under Section 3 of the Robinson-Patman Act, for the reason that said section is not one of the "Anti-Trust Laws", within the purview of Section of the Clayton Act (15 U.S.C.A., Section 15), and no private right of action for violation of said section exists under any laws of the United States; sixth, the Amended Complaint fails to state a claim upon which relief can be granted, under Section 3 of the Robinson-Patman Act (Title 15, U.S.C.A., Section 13a), for the reason that said Complaint fails to allege facts establishing a violation of Section 3 of the Robinson-Patman Act, or facts demonstrating injury to plaintiff's business or property on account of an alleged violation of said section.

The grounds dispositive of this cause of action in its present status, will be taken up in the order of their importance.

It has been deemed best to formulate appendices to this Opinion, wherein can be contained the various statutes in dispute, together with pertinent references to actions taken [fol. 12] on Congressional bills by the Senate, the House of Representatives and committees thereof. By so doing, needless excerpts from the Statutes and from Congressional proceedings can thus be avoided.

Little need be said, relative to the Motions to Strike and Make Definite and Certain, in view of the disposition hereinafter made of the cause on the Motion to Dismiss. Suffice it to say, if this cause be eventually tried upon its merits, the issues to be submitted to a Jury, which has already been demanded herein, can be delineated with precision at a Pre-Trial Conference, and thereby improper allegations can be deleted from any submission of the cause to a Jury. Likewise, by means of Pre-Trial Conferences, by Discovery (Rules 26 through 37), and by adherence to the suggestions contained in "Short Cuts in Long Cases", 13 Fed. Rules

Decisions, page 42, et seq., pertinent information should be acquired by all of the parties hereto, so that a full presentation of all the ramifications of this cause can be had.

Passing, now, to the Motion to Dismiss, the Court passed upon the three grounds therein, which were strenuously argued, orally, before the Court, namely, that the Court lacks jurisdiction of the subject matter of this action; that section 3 of the Robinson-Patman Act is unconstitutional, and lastly, that a private litigant has no right to maintain a treble damage action for violation of Section 3 of the Robinson-Patman Act. Defendant contends that Section 3 of the Robinson-Patman Act specifically requires that the action constituting violations thereof, must occur "in the course of commerce", and that the Act is specifically limited to things done in the course of commerce, and has no application to purely intra-state transactions, citing Myers vs. Shell Oil Co., 96 F. Supp. 670, and Standard Oil Co. vs. Federal Trade Commission, 345 U.S. 231. Defendant emphasizes in this regard that all of the sales involved in this case were at retail from the Safeway markets to the home consumer.

It is true that under the doctrine of Schechter vs. U.S., 295 U. S. 495, Atlantic Co. vs. Citizens Ice & Cold Storage Co., 178 F. (2) 453, and Ewing-von Allmen Dairy Co. vs. C. & C. Ice Cream Co., 109 F.(2) 898, and Federal Trade Commission vs. Bunte Bros., Inc., 312 U. S. 349, together [fol. 13] with many other cases of similar tenor, retail sales are considered solely as intra-state transactions. We are nevertheless confronted with the holding and the language in Moore vs. Meads Fine Bread Co., 348 U. S. 115; decided by the Supreme Court of the United States in December, 1954.

The plaintiff strongly urges that the merchandising policies, from those of broad national concept down to the specific pricing of individual items of food, are conceived and executed at defendant's division headquarters in El Paso, Texas, and at its Oakland, California, offices, and that the local operator of the defendant's public markets merely follows to the last detail, the comprehensive plans made beyond the boundaries of this district. This contention of the plaintiff must be regarded as true, for

the purposes of the instant Motion, and in view of this strenuous contention, and the language in the Mead Bread case, supra, this Court is loathe to rule upon this ground at this stage of the proceedings, and hence will reserve ruling thereon, until some future proceeding in this cause. The Court does not wish to have this ruling be regarded as a direct overruling of this ground, lest it be regarded as "the law of the case".

We pass, now, to the second ground, that Section 3 of the Robinson-Patman Act is unconstitutional. The challenged statute appears as Section 3 of the Robinson-Patman Act first set forth in the appendix hereto. Defendant contends that this section is so vague, indefinite and uncertain that an accused cannot determine in advance, with reasonable certainty, what conduct on its part might be claimed to violate that section's provisions. In support of its motion, defendant has cited and argued the cases of Connally vs. General Construction Co., 269 U.S. 385, U.S. vs. Cohen, Grocery Co., 255 U.S. 81, Musser vs. Utah, 333 U.S. 95, and Cline vs. Frink Dairy Co., 274 U.S. 445. A thorough study of the statute in question, and the authorities pertinent thereto, have implanted in the Court's mind grave doubts as to the constitutionality of Section 3 of the Robinson-Patman Act, Title 15 U.S.C., Section 13a. A sound application of the canons of constitutional law, however, makes it improvident for this Court to rule upon this issue at this stage of the proceedings. It is a general principle of consti- [fol. 14] tutional law, that Courts will not pass on the constitutionality of an Act of the Legislature, if the merits of the case may fairly be determined otherwise, without so doing. See Flint vs. Stone Tracy Co., 220 U.S. 107; Wright vs. Vinton Mountain Trust Bank, 300 U.S. 440, and Crowell vs. Benson, 285 U.S. 22. Stated differently it may be said that a court will pass upon the constitutionality of law only when necessary to the determination upon the merits of the case under consideration. See Ohio River Co. vs. Dittey, 232 U.S. 576; Southwestern Oil Co. vs. Texas, 217 U.S. 114, and Marvin vs. Trout, 199 U.S. 212.

Inasmuch as the Court's ruling as hereinafter discussed is to the effect that Title 15, U.S.C.A., Section 13a is a criminal statute, only, and does not afford a private litigant an action for treble damages for violation thereof, no neces-

sity appears for a direct holding as to the constitutionality of such statute. For this reason, the Court will resist the allure of proceeding further under this phase of the case, will reserve ruling on that point, and will now proceed to the ground which the Court holds disposes of the matter presented to the Court.

In holding as it does, that a private litigant has no right to maintain a treble damage action for violation of Section 3 of the Robinson-Patman Act, 15 U.S.C. 13a, the Court does so after recourse to Vols. 79 and 80 of the Congressional Record, the Committee Reports pertaining to the Robinson-Patman Act, and the Borah-Van Nuys bill, and a reference to Vol. 38, U. S. Statutes at Large, 730, et seq., and 49 U. S. Statutes at Large, pages 1526, et seq.

A summary of the legislative history of the statutes under consideration in this case is set forth in the third part of the appendix to this opinion, and reference may be had thereto for the factual background upon which the Court's decision is, to some extent, predicated. It should be pointed out that unnecessary confusion is presented to any person checking the United States Code or U. S. Code Annotated, by reason of the method adopted by the codifiers in labeling the Acts in question. Sections 1 and 2 of the Robinson-Patman Act are set forth respectively in Title 15, U.S.C. as sections 13 and 21a, while Section 3 thereof is labeled [fol. 15] "13a". This confusing numbering of the Statutes accounts, in the Court's opinion, for much of the confusion appearing in previous decisions seeking to construe these important Acts of Congress. I feel that the Bench and the Bar have, in times past, been led into error by reason of this method of codification, and may account for some of the opinions now existing in our law reports.

As a starting premise, we may assume that private litigants have no right of action under the Anti-trust laws, unless the right is specifically created and granted by Congress. 15 U.S.C. 15 provides, in effect, that any person injured in business by reason of anything forbidden in the Anti-trust laws, may sue therefor in any District Court of the United States, and shall recover triple damages, costs of suit and a reasonable attorney's fee. In order to determine the meaning of the words "Anti-trust laws", one must look at that section of Title 15 U. S. Code, defining the

words used therein. Referring, first, to Section 12 of Title 15, U. S. Code, we find that "Anti-trust laws", as used in Section 15 of said Title, include sections 1 to 27 of Title 15. Were one to stop at this stage of legal research, the immediate result would be that one would be convinced that Title 15, U.S.C., Section 13a, being included between Sections 1 and 27 of Title 15, is an Anti-trust law, the violation of which would give rise to a triple damage action on the part of an injured competitor. The codifiers state as the source of Section 12, Title 15, U.S.C.A., Chapter 323, Section 1, 38 Stat. 730, approved October 15, 1914. A portion of Section 1 of Chapter 323 of the Statutes at Large last above cited, is set forth in the Appendix. It will be noted that the Anti-trust laws therein defined, relate by title and date, to the Sherman Act, the Clayton Act, amendments to each of the said Acts, and to a certain taxation act, all enacted prior to October 15, 1914. This section has never been amended by Congress, and hence, we must construe and limit the definition of "Anti-trust laws", to those laws specifically enumerated in the 1914 Statutes and such subsequent Acts of Congress as amend any of the Acts specifically therein enumerated. To do otherwise would constitute Judicial legislation, and would be an affront to one of the three coordinating and separate branches of our National Government.

A close examination of the Robinson-Patman Act, as it [fol. 16] appears in 49 Stat., pages 1526 to 1528, conclusively shows the Clayton Act was amended, and only amended by Section 1 of the Robinson-Patman Act. The enacting clause of Chapter 592 of the 74th Congress provides that Section 2 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1954, as amended (U.S.C., Title 15, Section 13), is amended to read as provided in Section 1 of the Robinson-Patman Act. Said Section 2 is preceded by quotation marks, which continue until the end of Section 1 of the Robinson-Patman Act. Section 2, regarding pending litigation, Section 3 being the Act upon which plaintiff Vance seeks damages herein, and Section 4 being a exclusion of cooperative associations, do not purport to be amendatory of any then existing Anti-trust Act. Congress does not appear to even have attempted to so

amend exising Anti-trust Acts, and such an intent should not be implied by those of us whose duty it is to construe Congressional Statutes.

I take it that no authority need be cited as to our right to go behind the codifications of our Federal laws. 1 U.S.C.A., page 4, states, in effect, that the matters set forth in the Code shall establish prima facie, the laws of the United States which are general and permanent in nature, but, nothing in the Act authorizing the codification shall be construed as repealing or amending any such law, or as enacting as new law, any matter contained in the Code. It is then provided that in case of any inconsistencies arising through omission or otherwise, between the provisions of any of the sections of the Code, and the corresponding portions of the legislation theretofore enacted, effect shall be given for all purposes whatsoever, to such enactments.

When Congress creates a new offense and sets forth the penalty which the Court concludes Congress did, as to Title 15, U.S.C. 13a, the penalty so provided, in this case a criminal penalty, is exclusive. See Wilder Mfrg. Co. vs. Corn Products Refinery Co., 236 U.S. 165; State of Minn. vs. Northern Securities Co., 194 U.S. 48; U. S. vs. Cooper Corp., 312 U.S. 592, and Paine Lumber Co. vs. Neal, 244 U.S. 459.

This point of law has never received the specific attention of the Supreme Court of the United States. It was urged by the plaintiff that the decision of that tribunal in the [fol. 17] Meade Bread Case, supra, is authority for the proposition that a private litigant has a right for damages in a civil action. A study of the court file in this district, where that cause arose, a study of the transcript on appeal, and many readings of Mr. Justice Douglas' opinion all point to the conclusion that never once, by direction or indirection, was this issue brought to the attention of the trial court, the U. S. Court of Appeals, nor of the Supreme Court of the United States. This issue has received the attention of several U. S. Districts Courts, and at least one U. S. Court of Appeals. In the case of National Used Car Market Report, Inc. vs. National Auto Dealers Association, 108 F. Supp. 692 (D.C. D.C., 1951), in dismissing a complaint under Section 3 of the Robinson-Patman Act, the court stated "The court is inclined to the view that no action for

damages or injunction is maintainable under the section in question." The Court of Appeals of the District of Columbia, in affirming that decision in the case of National Used Car Market Report vs. National Auto Dealers Association, 209 F. (2) 359, apparently approved of the lower court's ruling that no civil action is available to a private litigant. To be sure, the matter was not extensively presented in the opinion of either court, but this Court is convinced that the rule of the Court of Appeals for the District of Columbia is that no action for damages exists in a private individual, and that that court is in harmony with the instant decision.

In the case of Hershel Calif. Fruit Products Co. vs. Hunt Foods, 119 F. Supp. 603, the court expressed grave doubts as to whether Section 3 of the Robinson-Patman Act is one of the Anti-trust laws, so as to provide a private right of action for its violation. This opinion is apparently shared by contributors to Law Review articles. See 50 Harvard Law Review, pages 406, 121 and 122. Werne "Business and the Robinson-Patman Law." See; also, 85 Univ. of Pa. Law Review, 306; 22 Wash. Univ. Law Quarterly 153, and 22 Amer. Bar Association Journal 539, at page 649, Note 14. Another non-judicial opinion, which harmonizes with this decision, is that of the Attorney General's National Committee to Study the Anti-trust Laws; in its report dated March 31, 1955 at page 200, it is stated:

"We believe that acceptance of Section 3 as a basis for private treble damage litigation involves highly dubious statutory construction and, more important, finds support [fol. 18] neither in the legislative intent nor overall anti-trust policy. Hence, at the least, any authority to enforce Section 3 should be restricted to responsible officials of the United States. Such drastic legislation threatening common and competitive pricing practices with the risk of criminality, if tolerated at all, should be accessible only to the Government which has already sought to limit its application."

The decisions reaching an opposite conclusion have *have* been collected and set forth by U. S. District Judge Yankwich in the case of Ballian Ice Cream Co. vs. Arden Farms Co., 94 F. Supp. 796 (1950). I realize that Judge Yankwich is an able Jurist with considerable experience in

Anti-trust law, both prior to his ascendency to the Federal Bench; and during his tenure thereof. In spite of this, I disagree with him, and herein hold directly contra to that Jurist. An analysis of the authorities upon which he apparently relied; and which he sets forth in the Ballian Ice Cream Co. case, demonstrates that they either do not involve Section 3 of the Robinson-Patman Act at all, or involve said Statute, together with various sub-sections of Title 15 U.S.C. 13(a). As I remember it, some eight cases are cited in the Ballian case, but if said number were quadrupled, those cases would not change my deep-set conviction, which is my ruling herein, that Title 15, U.S.C. 13a, is a criminal statute only, and that a private litigant has no right of action for damages for an alleged violation thereof.

The defendant will submit an Order in conformity with this Opinion by January 31, 1956.

Waldo H. Rogers, United States District Judge.

APPENDIX "A" TO OPINION

The Robinson-Patman Act

[Public—No. 692—74th Congress]

[H. R. 8442]

An Act

To amend section 2 of the Act entitled "An Act to sup-
[fol. 19] plement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U.S.C., Title 15, sec. 13), and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (U.S.C., Title 15, sec. 13), is amended to read as follows:

"Sec. 2. (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce,

either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof of the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in [fol. 20] restraint of trade; And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

"(b) Upon proof being made, at any hearing on com-

plaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation this section, and unless justification shall be affirmatively shown, the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchase or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

"(c) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

"(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or [fol. 21] commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

"(e) That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any serv-

ices or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

"(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

SEC. 2. That nothing herein contained shall affect rights of action arising, or litigation pending, or orders of the Federal Trade Commission issued and in effect or pending on review, based on Section 2 of said Act of October 15, 1914, prior to the effective date of this amendatory Act: Provided, That where, prior to the effective date of this amendatory Act, the Federal Trade Commission has issued an order requiring any person to cease and desist from a violation of section 2 of said Act of October 15, 1914, and such order is pending on review or is in effect, either as issued or as affirmed or modified by a court of competent jurisdiction, and the Commission shall have reason to believe that such person has committed, used or carried on, since the effective date of this amendatory Act, or is committing, using, or carrying on, any act, practice or method in violation of any of the provisions of said section 2 as amended by this Act, it may reopen such original proceeding and may issue and serve upon such person its complaint, supplementary to the original complaint, stating its charges in that respect. Thereupon, the same proceedings shall be had upon such supplementary complaint as provided in section 11 of said Act of October 15, 1914. If upon such hearing the Commission shall be of the opinion that any act, practice, or method charged in said supplementary complaint has been committed, used, or carried on since the effective date of this amendatory Act, or is being committed, used or carried on, in violation of said section 2 as [fol. 22] amended by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and serve upon such person its order modifying or amending its original order to include any additional violations of law so found. Thereafter, the provisions of section 11 of said Act of October 15, 1914, as to review

and enforcement of orders of the Commission shall in all things apply to such modified or amended order. If upon review as provided in said section 11 the court shall set aside such modified or amended order, the original order shall not be affected thereby, but it shall be and remain in force and effect as fully as to the same extent as if such supplementary proceedings had not been taken.

SEC. 3. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both.

SEC. 4. Nothing in this Act shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association.

Approved, June 19, 1936.

[fol. 23] APPENDIX "B" TO OPINION

Section 1 of the Clayton Act, Chapter 323, section 1, 38 Stat. 370, reads as follows:

"That 'antitrust laws' as used herein includes the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes', of August twenty-seventh, eighteen hundred and ninety-four; an Act, entitled 'An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes' approved February twelfth, nineteen hundred and thirteen; and also this act."

Chap. 323, Section 1, 38 Stat. 730.

APPENDIX "C" TO OPINION

Legislative History of Section 3, Robinson-Patman Act

An analysis of the legislative history of Section 3 of the Robinson-Patman Act shows that it was a separate criminal statute known as the Borah-Van Nuys Bills, which was introduced in the Senate on May 4, 1936, some eight months after the Robinson and Patman Bills were presented to the House and Senate.

The Borah-Van Nuys measure was attached to the Robinson Bill (No. 4171), in the Senate as a Floor Amendment, but not as an amendment to the Clayton Act, and became Section 3 of the Robinson Bill. (80 Cong. Rec. 6349).

The phraseology of the Borah-Van Nuys measure was unchanged from the time of its introduction to the time of its enactment. Its provision is almost identical in wording with the Canadian Price Discrimination Act, which is a part of the Canadian Criminal Code, (25-26 Geo. V. Chap. 56 Section 9 (Canada 1935)).

[fol. 24] The Patman Bill was passed by the House on

In the form in which it was finally enacted the Robinson-Patman Act represents an amalgamation of a series of legislative proposals originating with the Patman bill introduced by Representative Patman on June 11, 1935 (79 Cong. Rec. 9081). Joint hearings were held beginning on July 10, 1935, and extending through the last session of the 74th Congress on the Patman bill and also on H. R. 4995 and H. R. 5062, introduced by Representative Mapes. Unable to reach a conclusion on the basis of its first hearings, the committee entrusted further hearings to a subcommittee headed by Representative Utterback. Prior to reconvening his subcommittee in February, 1936, Mr. Utterback had introduced his own bill (H. R. 10486), some features of which were ultimately incorporated in the Patman bill. On March 31, 1936, the House Committee favorably reported the Patman bill in considerably modified form.

Consideration in the Senate was somewhat less extended. On June 26, 1935, shortly after the introduction of the Patman bill in the House, Senator Robinson introduced an identical measure, S. 3154 (79 Cong. Rec. 10129), in the Senate. No hearings were ever held on this measure. On February 3, 1936, the Senate committee on the Judiciary favorably reported the Robinson bill with substantial amendments.

In the meantime on January 16, 1936, Senator Borah had introduced a bill, S. 3670, likewise designed to prohibit price discrimination (80 Cong. Rec. 461), and on January 30, 1936, Senator Van Nuys introduced a similar measure, S. 3835 (80 Cong. Rec. 1194). On March 4, Senators Borah and Van Nuys consolidated their bills in a single measure, S. 4171 (80 Cong. Rec. 3204), on which a subcommittee of the Senate committee on the judiciary held hearings. No report was ever made on these measures. In addition Senator Copeland had introduced two similar measures, S. 4024 and S. 4275. No committee action was taken on these. When the Robinson bill came to a vote in the Senate on April 23 and 24, the Borah-Van Nuys measure was attached to it [fol. 27] as a floor amendment, but not as an amendment to the Clayton Act, and became Section 3 of the Robinson bill (80 Cong. Rec. 6349).

The Patman bill was passed by the House on May 28,

1936, and it and the Robinson bill went to conference. After a short conference, the conference committee reported a revised draft on June 8, 1936, incorporating the Borah-Van Nuys Amendment as Section 3. This revised draft was eventually enacted by Congress and approved by the President in the form hereinbefore set forth in Appendix "A" hereof, as extracted from 49 Stat. 1526.

In United States District Court for the District of New Mexico

Election of Plaintiff Not To Amend First Amended Complaint—Filed March 8, 1956

Comes now Plaintiff and respectfully states to the Court that it hereby elects not to amend Plaintiff's First Amended Complaint, and Plaintiff states that he desires to stand upon the allegations of such First Amended Complaint.

Dated this 24th day of February, 1956.

Nordhaus & Moses, By Donald B. Moses, Attorneys for Plaintiff.

In United States District Court for the District of New Mexico

Order Dismissing First Amended Complaint—March 8, 1956

The Court having heretofore entered its order, and having ordered, adjudged and decreed in the following words: "that Plaintiff's Complaint herein be and the same is dismissed upon the ground above stated", and having further ordered in the words as follows: "that Plaintiff be and he hereby is granted thirty (30) days from the entry hereof to amend his complaint", and it appearing that the Court in such order in each instance was referring to Plaintiff's "First Amended Complaint", and not to Plaintiff's "Complaint", and it further appearing to the Court that the Plaintiff has filed herein his election to stand upon his First

Amended Complaint and to file no amended Complaint herein, and it further appearing that a Notice of Appeal has been filed herein, and that such Notice of Appeal should [fol. 28] be stamped with a new filing date by the Clerk of this Court and considered as a Notice of Appeal directed at the entry of this Order, and the Court being fully advised in the premises, Finds:

That Plaintiff's First Amended Complaint should be dismissed.

Now, Therefore, It Is Ordered, Adjudged and Decreed that Plaintiff's First Amended Complaint and this cause should be, and the same are hereby dismissed.

It Is Further Ordered that the Clerk in this Court be and he is hereby authorized and directed to re-stamp a filing date on the Notice of Appeal heretofore filed herein as of the date of the entry of this Order of Dismissal, and that the said Notice of Appeal should be considered for all purposes as being directed against this Order.

Waldo H. Rogers, District Judge.

Submitted: John B. Tittmann Atty for Defts. Submitted Donald B. Moses Atty for Plaintiff.

In United States District Court for the District of New Mexico

Notice of Appeal—Filed February 14, 1956

Notice is hereby given that Harry V. Vance, Trustee in Bankruptcy for Frank Melvin Thompson, Bankrupt, Plaintiff in the above entitled cause, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the order dismissing Plaintiff's Complaint entered in this action on January 18, 1956.

Dated this 14th day of February, 1956.

Nordhaus & Moses, By Robert J. Nordhaus, Attorneys for Appellants.

Filed Feb. 14, 1956. Re-filed by order of Court March 8, 1956.

[fol. 29] [By order of April 3, 1956, the time for docketing the cause in the Court of Appeals was extended to April 7, 1956.]

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 30] In United States Court of Appeals for the Tenth Circuit

[Caption omitted]

[fol. 31] Minute Entry of Argument and Submission—September 5, 1956

(Omitted in printing)

[fol. 32] In the United States Court of Appeals for the Tenth Circuit—September Term, 1956

No. 5366

Harry V. Vance, Trustee in Bankruptcy for Frank Melvin Thompson, Bankrupt, Appellant,

v.

Safeway Stores, Incorporated, a corporation, Appellee.

Appeal from the United States District Court for the District of New Mexico

Opinion—November 6, 1956

Robert J. Nordhaus, Albuquerque, New Mexico, (Nordhaus & Moses), for Appellant.

John B. Tittmann, Albuquerque, New Mexico, (W. A. Keleher, Albuquerque, New Mexico; Douglas Stripp, and

Watson, Ess, Marshall & Enggas, all of Kansas City, Missouri, were with him on the brief), for Appellee.

Before Huxman, Murrah and Pickett, Circuit Judges.

PICKETT, Circuit Judge:

[fol. 33] The Trustee in Bankruptcy for Frank Melvin Thompson brought this action against Safeway Stores, Inc., to recover treble damages under § 3 of the Robinson-Patman Act, (15 U.S.C.A. § 13a).[1] The complaint is based solely upon violations of the second and third clauses of § 3, wherein it is alleged that Safeway made sales at unreasonably low prices and territorial discrimination in prices for the purpose of injuring competition to the damage of Thompson, who at the time was in the retail grocery

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[1] § 13a reads as follows:

"Discrimination in rebates, discounts, or advertising service charges; underselling in particular localities; penalties.

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

"Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both. June 19, 1936, c. 592, § 3, 49 Stat. 1528."

business in Albuquerque, New Mexico. It suffices to say that the allegations, if true, constituted violations of § 3. The trial court expressed doubt as to the constitutionality [fol. 34] of § 3, but chose to ease its conclusion on a holding that the section was no part of the antitrust statutes of the United States, and dismissed the action on the ground that a civil action for treble damages was not available to a private litigant under 15 U.S.C.A. § 15. We do not agree with this conclusion.

15 U.S.C.A. § 15 was included in the Clayton Act (38 Stat. 730), and provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor * * * and shall recover threefold the damages by him sustained, * * *" together with reasonable attorney's fees and costs. The Clayton Act defined "antitrust laws" as designated statutes existing at the time. Upon codification this section became 15 U.S.C.A. § 12, and defined "antitrust laws" as section 1-27 of Title 15. It is contended that § 13a was not one of those antitrust laws as defined in § 1 of the Clayton Act and the codifiers could not amend the law by including it in § 12. This is no doubt true if § 3 is a separate act. The code is only prima facie evidence of the law, and the language of the original statute controls. Act creating U.S. Code, U.S.C.A. Vol. 1, p. 4; Stephan v. United States, 319 U.S. 423; Murrell v. Western Union Tel. Co., 5 Cir. 160 F. 2d 787. If, however, § 3 is in fact an amendment to the Clayton [fol. 35] Act, it was properly designated in the codification. To be an amendment to an existing law, the statute need not be so labeled. A law is amended when it is permitted to remain and something is added or taken from it or is in some way changed or altered to better accomplish its purpose. United States v. Lapp, 6 Cir., 244 Fed. 377; Balian Ice Cream Co. v. Arden Farms Co., 94 F. Supp. 796.

In holding that §3 was not an amendment to the Clayton Act but a separate Act for which a civil remedy was not available to the plaintiff under §15, the trial court relied to a large extent upon the legislative history of the Act. Safeway here insists that the history sustains the trial court, while the Trustee maintains the opposite view. We think a study of the committee reports, the discussions and

debates on the Robinson-Patman Act, both in the House and Senate, leads to the conclusion that it was generally understood at the time that §3 of that Act was supplementary and amendatory of the antitrust laws and that in addition to the criminal sanctions, an injured party could recover treble damages under the provisions of the Clayton Act. The Act dealt exclusively with the subject matter of the existing antitrust laws. It was a continuation of the Con- [fol. 36] gressional attack upon the evils of combinations, monopolies and restraints of trade and commerce designed to stifle competition. In each instance "Congress was dealing with competition which it sought to protect, and monopolies which it sought to prevent". Standard Oil Co. v. United States, 340 U.S. 231, 249; Staley Mfg. Co. v. Federal Trade Commission, 7 Cir., 135 F.2d 453. The title to the Act states that it is an act to amend §2 of the Clayton Act, and for other purposes, but the enacting clause recites only that §2 "is amended to read as follows:" and the entire Robinson-Patman Act follows, although the first section, designated as §2, is in quotation marks, while the last three sections are not. We do not think that failure to include the last three sections in quotation marks has the significance which the trial court gave to it, because these sections are not referred to in any other manner than in the enacting clause. Without specific language excluding these three sections from the enacting clause, we feel constrained to hold that they are included thereunder and must be considered as amending the Clayton Act.

In Balian Ice Cream Co. v. Arden Farms Co., supra, Judge Yankwich, in a thorough and painstaking review of antitrust legislation and the authorities, concluded that §3 was an amendment of the Clayton Act and upheld the right [fol. 37] of a private litigant to sue for treble damages under §15. We adopt the reasoning and conclusions reached in that case. Generally the courts which have had occasion to consider the question have agreed that the recovery of treble damages was available to private litigants for violation of §13a. Atlanta Brick Co. v. O'Neal, (D.C.E.D. Tex.) 44 F.Supp. 39; A. J. Goodman & Son v. United Lacquer Mfg. Corp., (D.C. Mass.) 81 F.Supp. 890; Spencer v. Sun Oil Co. (D.C. Conn.) 94 F.Supp. 408; Myers v. Shell

Oil Co. (D.C.S.D. Calif., Cen. Div.) 96 F. Supp. 670; Hershel Calif. Fruit Prod. Co. v. Hunt Foods, (D.C. N.D. Calif. S.D.) 119 F.Supp. 603, appeal dismissed 9 Cir., 221 F.2d 797. In National Used Car Market, Inc., v. Nat'l. Auto Dealers Ass'n. (D.C., D.C.) 108 F.Supp. 692, the District Court was inclined to the view that §3 did not provide a civil remedy for damages, but did not so hold. The action was dismissed on other grounds and affirmed, 209 F.2d 359.

Although it was not necessary to a decision in the case, the Supreme Court, in Bruce's Juices, Inc., v. American Can Co., 330 U.S. 743, 750, had this to say:

> "The Act prescribes sanctions, and it does not make uncollectibility of the purchase price one of them. Violation of the Act is made criminal and upon conviction [fol. 38] a violator may be fined or imprisoned. 49 Stat. 1528, 15 U.S.C. §13a. Any person who is injured in his business or property by reason of anything forbidden therein may sue and recover threefold the damages by him sustained and the costs of suit, including a reasonable attorney's fee. 38 Stat. 731, 15 U.S.C. §15. This triple damage provision to redress private injury and the criminal proceedings to vindicate the public interest are the only sanctions provided by Congress."

Considering the result in Moore v. Mead's Fine Bread Co., 10 Cir., 184 F.2d 338, vacated and remanded 340 U.S. 945, and 208 F.2d 777, reversed 348 U.S. 115,[2] and what was

[2] In the Mead Bread case, as in this case, the plaintiff sought treble damages for violations of §13a. We first sustained a dismissal of the complaint. Upon mandate from the Supreme Court, this judgment was vacated and the case was tried to a jury which returned a verdict in favor of Moore for treble damages. We reversed and remanded with instructions to enter judgment for the defendant. The Supreme Court reversed and affirmed the judgment of the District Court. Although the question here was not raised, the court held that violations of §13a were "included within the scope of the antitrust laws" with the right to treble damages, even though the victim is a local resident and no interstate transactions were used to destroy it.

said in the Bruce's Juices case, without further word from the Supreme Court, we would be extremely hesitant to hold [fol. 39] that a valid judgment for treble damages could not be had for violations of §13a.

Reversed.

[fol. 40] In United States Court of Appeals for the Tenth Circuit

Judgment—November 6, 1956

Before Honorable Walter A. Huxman, Honorable Alfred P. Murrah and Honorable John C. Pickett, Circuit Judges

This cause came on to be heard on the transcript of the record from the United States District Court for the District of New Mexico and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed, that this cause be and the same is hereby remanded to the said district court for further proceedings in accordance with the views expressed in the opinion of the court, and that Harry V. Vance, Trustee in Bankruptcy for Frank Melvin Thompson, Bankrupt, appellant, have and recover of and from Safeway Stores, Incorporated, a corporation, appellee, his costs herein and have execution therefor.

[fol. 41] [File endorsement omitted]

In United States Court of Appeals, for the Tenth Circuit

[Title omitted]

Petition for Rehearing—Filed November 26, 1956

Comes now the appellee in the above styled and numbered cause, by its attorneys, and respectfully petitions the Court for a rehearing in this cause, and in support thereof shows to the Court as follows:

On November 1, 1956, just six days prior to the decision by the Court in this case, the Court of Appeals for the Seventh Circuit, in the case of *Nashville Milk Company* vs.

Carnation Company, No. 11820, decided the same issue contrary to the decision of the Court in this case, holding that a private action may not be maintained for violation of Section 3 of the Robinson-Patman Act, which decision and opinion were not available to this Court in reaching its decision.

It is respectfully submitted that this Court may wish to reconsider its decision and opinion in this cause, in the light of the reasoning and authorities contained in the opinion of the Seventh Circuit in the case of *Nashville Milk Company* vs. *Carnation Company*, a copy of which is attached hereto.

It is hereby certified that the within petition for a rehearing is filed in good faith and not for the purpose of delay.

Wherefore, appellee prays that a rehearing be granted in this cause.

W. A. Keleher, John B. Tittman, Albuquerque, New Mexico and Douglas Stripp, Kasas City, Missouri, Attorneys for Appellee.

Of Counsel: Watson, Ess, Marshall & Enggas, 1500 Dierks Building, Kansas City, Missouri.

[fol. 42] IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, SEPTEMBER TERM AND SESSION, 1956

No. 11820

NASHVILLE MILK COMPANY, Plaintiff-Appellant,

v.

CARNATION COMPANY, Defendant-Appellee

Appeal from the United States District Court for the Northern District of Illinois, Western Division

November 1, 1956.

Before Duffy, Chief Judge, and Major and Schackenberg, Circuit Judges

DUFFY, Chief Judge:

This is an appeal from an order dismissing the complaint herein before trial. This action was brought under Sec. 3

of the Robinson-Patman Act (Sec. 13a, Title 15 U.S. Code). Plaintiff sought to recover treble damages and asked injunctive relief claiming defendant had sold filled milk at unreasonably low prices for the purpose of destroying competition by plaintiff in its sale of a like product.

Plaintiff is an Illinois corporation, and since April, 1951, has manufactured and sold filled milk within the State of Illinois where such manufacture and sale is legal under the laws of Illinois. Defendant is a Delaware corporation which owns and operates some 30 factories in 20 states for the processing of milk.

Since May, 1952, defendant has manufactured filled milk at its factory located at Morrison, Illinois. For the purpose of manufacturing filled milk defendant has transported or caused to be transported into Illinois whole milk from the State of Wisconsin, and vegetable oils from various points outside of Illinois. The filled milk manufactured by Carnation has been marketed under the name "Topic" while Plaintiff's filled milk product was marketed under the name "Rich Whip".

Defendant moved to dismiss the complaint on four grounds. 1) The Robinson-Patman Act does not protect a business engaged in making and selling a product banned by Congress from the channels of interstate commerce; 2) The complaint fails to allege that any sales of filled milk by either plaintiff or defendant were in the course of interstate commerce; 3) The Complaint fails to allege that the manufacture of filled milk by the defendant was in the course of interstate commerce, and 4) A private action may not be maintained for an alleged violation of Sect. 3 of the Robinson-Patman Act.

The District Court dismissed the complaint for the reason that no relief should be accorded to the plaintiff in view of the declared congressional policy relative to filled milk as announced in 21 U.S.C.A. Sec. 62 which proscribes the shipment or delivery for shipment of filled milk in interstate commerce.

The decision of the District Court must be affirmed if the order of dismissal can be sustained on any of the grounds urged by defendant in support of its motion to dismiss. *Gallagher & Speck, Inc.* vs. *Ford Motor Com-*

pany, 7 Cir., 226 F. 2d 728, 731. Inasmuch as we are convinced that a private action may not be maintained for a violation of Sec. 3 of the Robinson-Patman Act, we shall not discuss the other grounds urged by the defendant.

The Supreme Court has not ruled upon this question and as far as we are advised, there has been no direct [fol. 43] decision on the point by any Court of Appeals.[1] There is, however, a direct conflict of authority in the District Courts. The leading case which holds that such a cause of action does exist is *Balien Ice Cream Co., Inc.* vs. *Arden Farms Co., et al.*, 94 F. Supp. 796 (D.C. Calif. 1950). The leading case to the contrary is *Vance* vs. *Safeway Stores*, 137 F. Supp. 841 (D.C. N.Mex. 1956). In the *Vance* case Judge Rogers carefully considered the decision in the *Balien Ice Cream* case and reached the conclusion that it was wrongly decided.

Plaintiff has no right to sue for treble damages or injunctive relief unless a federal statute has created that right. *Sun Theatre Corp.* v. *RKO Radio Pictures, Inc.*, 7 Cir. 213 F. 2d 284, 286; *Paine Lumber Company, Ltd., et al.* v. *Neal etc., et al.*, 244 U.S. 459, 471. The only statutes upon which the plaintiff could possibly rely are sections 4 and 16 of the Clayton Act (15 U.S.C. Secs. 15, 26); Section 4 provides that any person injured in his business or property by reason of anything forbidden by the "anti-trust laws" may recover treble damages. Section 16 authorizes private suits for injunctive relief against threatened damage by a violation of the "antitrust laws."

The Clayton Act (38 Stats. 730) defines the term "anti-trust laws" and states precisely what that term means as it is used throughout the Act. Section 1 of the Clayton Act defines "antitrust laws" to mean the Sherman Act (Act of July 2, 1890), the Wilson Tariff Act (Act of August 27,

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[1] Section 3 has been referred to in Supreme Court dicta as though it were a statute under which a private suit for treble damages could be maintained. *Bruce's Juices, Inc.* vs. *American Can Co.*, 330 U.S. 743, 750, and *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115, 117. However, in neither of these cases was the private right to sue under Section 3 in issue.

1894), the Act amending the Wilson Tariff Act (Act of February 12, 1913) and the Clayton Act itself.

It is quite apparent that confusion has arisen as to whether section 3 of the Robinson-Patman Act is an "antitrust law" within Section 1 of the Clayton Act because of an error in codification in the 1940 U.S. Code. In the 1926 U.S.Code, Section 1 of the Clayton Act was codified (15 U.S.C. Sec. 12) to read: "'Antitrust laws' as used in Section 12-27 of this title (Title 15) includes Sections 1-27 of this title." This was correct because Sections 1-27 of Title 15 were the Sherman Act, the Wilson Tariff Act (as amended) and the Clayton Act. The 1934 Code was the same.

However, in the 1940 Code which followed the passage of the Robinson-Patman Act in 1936, the codifiers only partially recognized that Sections 2, 3 and 4 of the Robinson-Patman Act (codified as 15 U.S.C. Sec. 21a, Sec. 13a and Sec. 13b) were no part of the Clayton Act or any amendments to any of its sections by changing the figures "12-27" in 15 U.S.C. 12 (the codification of Section 1 of the Clayton Act) to 12, 13, 14-21, 22-27" so that the stateute read: "'Antitrust laws' as used in Secs. 12, 13, 14-21, 22-27 of this title includes Sections 1-27 of this title." But the codifiers failed to make a corresponding change in the figures 1-27, with the result upon casual inspection the term "antitrust laws" might seem to include Secs. 2, 3 and 4 of the Robinson-Patman Act. The 1946 and 1952 Codes continued the error.

However, the United States Code is only prima facie evidence of the laws of the United States. In case of inconsistencies between the code and the corresponding legislation theretofore enacted, effect is to be given to the enactments themselves. 1 U.S.C. p. 4; *Stephan* vs. *United States*, 319 U.S. 423, 426.

Because Section 1 of the Robinson-Patman Act is without question an amendment of the Clayton Act, it has been argued that Section 3 is also such an amendment. A close examination of the text of the Robinson-Patman Act and of its legislative history convinces us that Section 3 is not an amendment of the Clayton Act.

[fol. 44] The first section of the Robinson-Patman Act begins with this statement: "Be it enacted * * * that Sec.

2 of (the Clayton Act) is amended to read as follows:". No such statement appears at the beginning of Sections 2, 3 or 4 of the Robinson-Patman Act. These sections do not purport to amend as Section 1 specifically did.

Immediately following the enacting clause, Section 1 continues with the text of subsections (a) through (f) each subject being enclosed in quotation marks so as to show how the amended Section 2 of the Clayton Act is to read. There are no quotation marks enclosing any of the remaining sections. This omission of quotation marks is significant to one who is accustomed with the procedures used in drafting bills and amendments thereto in the Congress in the United States. Illustrations of the practice of enclosing in quotation marks that portion of the bill which amended other laws can be seen in such legislation as Chapter 634, 49 Stat. 1555 relating to the Migratory Bird Act; Chapter 811, 49 Stat. 1925, relating to Naturalization Laws, and Chapter 816, 49 Stat, 1930, relating to Welfare of American Seamen, in each of which quotation marks enclose the portions of those bills which amended existing law while quotation marks were omitted for those portions of the bills which were not amendments.

The legislative history is convincing that there was no intention by Congress for Section 3 of the Robinson-Patman Act to be an amendment of the Clayton Act. Senator Robinson and Representative Patman had introduced their bills in the Senate and House, respectively. About eight months later a bill known as the Borah-Van Nuys Bill was introduced into the Senate. This provided for a criminal statute. Later, the Borah-Van Nuys Bill was attached to the Robinson Bill in the senate by a floor amendment. The phraseology of the Borah-Van Nuys measure remained unchanged until its enactment as Section 3 of the Robinson-Patman Act.

After the passage of the Patman bill in the House and the Robinson bill in the Senate, these bills went to a conference. The Conference Committee reported a revised draft on June 15, 1936, which incorporated the Borah-Van Nuys measure as Section 3 (80 Cong. Rec. 9414). The report of the Conference Committee (80 Cong. Rec. 9414, 9902)

expressly stated that only Section 1 was an amendment of the Clayton Act. The report stated:

"Section 2

"The provisions of Section 2 of the House bill were agreed to without amendment by the Senate. Relating only to pending rights of action and proceedings, and being therefore temporary in purpose, it appears in the conference report as Section 2 of the bill itself, rather than as part of the *amendment to Section 2 of the Clayton Act, which is provided for in Section 1 of the present Bill.*" (Emphasis supplied)

Section 3

"Subsection (h) of the Senate amendment, which was not contained in the House bill, was accepted by the House conferees, and * * * appears in the conference report as Section 3 of the bill itself. It contains the operative and penal provisions of what was originally the Borah-Van Nuys Bill (S.4171). *While they overlap in some respects*, they are in no way inconsistent with the *provisions of the Clayton Act amendment provided for in Section 1.*" (Emphasis supplied).

Representative Utterback, Chairman of the House Members of the Joint Conference Committee, stated in his report to the House (80 Cong. Rec. 9419): "Section 3 of the bill sets aside certain practices therein described and attaches to their commission the criminal penalties of fine and imprisonment therein provided. It does not affect the [fol. 45] scope or operation of the prohibitions or limitations laid down by *the Clayton Act amendment provided for in Section 1.*" (Emphasis supplied)

Representative Miller, one of the House conferees of the Joint Conference Committee, stated (80 Cong. Rec. 9421): "Section 3 is the Borah-Van Nuys amendment. We accepted that amendment for this reason and this reason only. The first section of the bill as reported back here *amends section 2 of the Clayton Act.*" Mr. Miller, when asked whether section 3 was "a part of the same act" as the part of the bill amending the Clayton Act replied (80 Cong. Rec.

9423): "Of course it is, *but it is not a part of the Clayton Act.* * * *." (Emphasis supplied).

Writers of law articles on the subject here for decision have taken the position that no action may be maintained for treble damages under section 3 of the Robinson-Patman Act: 50 Harvard Law Review 106, 121-122; 85 University of Pennsylvania Law Review, 306, 312; 22 Washington Law Quarterly, 153, 159, 182; 22 American Bar Association Journal, 593, 649.

The Attorney General's National Committee to Study the Antitrust Law said, on page 201 of its report of March 31, 1955:

> "We believe that acceptance of section 3 as a basis for private treble damage litigation involves highly dubious statutory construction and, more important, finds support neither in the legislative intent or overall antitrust policy. Hence, at the least, any authority to enforce Section 3 should be restricted to responsible officials of the United States. Such drastic legislation threatening common and competitive pricing practices with the risk of criminality, if tolerated at all should be accessible only to the government which has already sought to limit its application."

As we have reached the conclusion that a private action may not be maintained for a violation of Section 3 of the Robinson-Patman Act, it follows that the District Court was correct in dismissing the complaint and the order and judgment of dismissal must and is affirmed.

[fol. 46] CERTIFICATE OF COUNSEL—Filed November 26, 1956

The undersigned, one of the attorneys for the appellee, hereby certifies that the Petition for Rehearing in this case was filed in good faith, and not for purposes of delay.

John B. Tittmann.

[fol. 47] IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ORDER DENYING APPELLEE'S PETITION FOR REHEARING—December 4, 1956

This cause came on to be heard on the petition of appellee for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

[By order of December 12, 1956, the mandate of the United States Court of Appeals was stayed for a period of thirty days from December 14, 1956, under provision of paragraph 3 of rule 28.]

[fol. 48] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 49] SUPREME COURT OF THE UNITED STATES—OCTOBER TERM, 1956

No. 707

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed March 4, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted, and the case is transferred to the summary calendar. The case is assigned for argument immediately following No. 699.

And it is further ordered that the duly certified copy of the transcript of the proceeding below which accompanied the petition shall be treated as though filed in response to such writ.